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IN THE

Supreme Court of the United States

October Term, 1962.

No. 228

SAMUEL FREEDMAN ET AL.,
Petitioners,

v.

PHILADELPHIA TERMINALS AUCTION COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

DAVID BERGER,
WALTER STEIN,
1220 P.S.F.S. Bldg.,
Philadelphia 7, Pa.,
Attorneys for Petitioners

Of Counsel:
FRANK H. GELMAN,
1510 Fidelity-Philadelphia Trust Bldg.,
Philadelphia 9, Pa.

July 5, 1962.

International, 711 So. 50th St., Phila. 43, Pa.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

OPINIONS BELOW.

The opinion of the Court of Appeals were filed April 9, 1962, and it has not yet been reported. It is printed as Appendix A, hereto, *infra* p. 15.

The opinion of the District Court is reported in 197 F. Supp. 849, and is printed at pages 326A of the Appendix which was printed by the petitioners for use in the court below, nine copies of which have been filed with the petition, in accordance with rule 23(i).

JURISDICTION.

The judgment of the Court of Appeals was dated and entered on April 9, 1962, and the date of the filing of this petition is within ninety days of that date.

The jurisdiction of this Court is invoked under 28 U. S. C. sec. 1254(1).

STATUTE INVOLVED.

Robinson-Patman Act:

Sec. 2. *Discrimination in price, services, or facilities-Price; selection of customers.*

(c) It shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid.

(15 U. S. C. 1958 ed., Sec. 13(c).)

Sec. 15. *Suits by persons injured; amount of recovery.*

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

(15 U. S. C. 1958 ed., Sec. 15.)

QUESTION PRESENTED.

Where an auction company acting for the Seller, has collected payments from the Buyer in violation of sec. 2(c) of the Robinson-Patman Act, 15 U. S. C. sec. 13(c), is the Buyer entitled to recover the amount of these payments as damages pursuant to the anti-trust laws?

STATEMENT OF THE CASE.

This is a suit by three buyers of fruit against a fruit auction company for violations of the provisions of the Robinson-Patman Act (15 U. S. C. A. 13(c)). The suit was originally brought as a class action on behalf of some seventy buyers and contained two additional counts. The additional counts were dropped during the trial and the action was limited to the plaintiffs as individuals on their own behalf.

The Philadelphia Terminals Auction Company is the only place in the Philadelphia market area where fresh fruit in less than carload lots is originally sold at wholesale. Fresh fruit arrives by carrier from growers in many parts of the country, and especially from Florida and California. Sometimes the fruit is consigned to independent fruit brokers, often it is consigned to a local representative of the grower. These "receivers", as they are called in the trade, in turn sell the fruit to buyers by use of the facilities of the defendant auction company.

Both the Pennsylvania Railroad and the Baltimore and Ohio Railroad provide at their respective railroad sidings platform and auction rooms free of rent to the auction company. On alternate days the sales are held on the siding and auction room of each railroad (160a).

The receivers advise the auction company that they have carloads of fruit they wish sold. The defendant has the railroad bring those cars to the latter's rail siding and platform where the fruit is unloaded by railroad employees (155a). From the manifests of the cars, the defendant auction company prints catalogues listing the merchandise for that day's sale and displays samples from each car (147a, 155a). The buyers, just prior to the sale, inspect the fruit, or samples of it, to be sold that day. The auction takes place at 8:30 A. M. in auction rooms belonging to the respective railroad (157a).

At the sales, the receiver stands alongside the auctioneer (162a). He may instruct the auctioneer not to offer a

particular line for sale, or he may instruct the auctioneer to ask for a first bid of a certain amount per box (162a, 163a). The auctioneer conducts the sale in the usual auction procedure, "knocking down" the offered merchandise to the highest bidder. There are fixed rules with respect to minimum quantities and as to when goods may be withdrawn to the seller during the sale.

As soon as the goods are knocked down, the successful bidder can send his trucks to pick up his purchase (164a, 165a). If the bidder has not previously established a line of credit with the auction company, he is required to pay cash. All of the buyers here involved have been dealing with the auction company for a considerable period of time and have established a line of credit. The auction company pays the seller within 24 hours the amount of the sale less the auction company's commission and freight charges which the auction company pays to the railroad on behalf of the seller (171a, 173a, 174a). These payments are made independently of the defendant's billings to the buyers.

Some of the buyers at the auction sales are brokers while others are wholesalers. Plaintiffs Freedman and Dankel are brokers. They buy at the sale on behalf of regular clients (5a), using their own judgment as to clients' needs and receive a commission for their services at 5 or 10 cents per box of fruit (16a). The sales are charged by the auction company to the brokers' accounts and each week's accounts must be paid by the following Wednesday (15a). The brokers, in turn, bill their clients. Sometimes the client himself will have a line of credit with the auction company. In that case, the auction company will bill the client directly, but the broker remains liable.

Plaintiff Rosengarten is a wholesaler or jobber. He buys at the auction on his own behalf and in turn resells the fruit in his wholesale fruit market, making a profit or not, depending upon market conditions. Plaintiff Rosengarten must, of course, pay for his purchases at the auction

whether or not he is able to resell the fruit in his market. Similarly, plaintiffs Freedman and Dankel are responsible even if their clients reject their purchases (15a).

Prior to 1948, the railroad unloaded without charge the fruit from the cars onto its platform (179a). On November 1, 1948, the railroads were granted permission by the Interstate Commerce Commission to impose an unloading charge for this service (176a, 177a). In 1952, the I. C. C. altered these rates and a new, lower unloading charge became effective on July 3, 1952 (189a). By order of the Commission, effective on October 17, 1956, the unloading charge was cancelled altogether. While they were in effect, these unloading charges were billed to the consignee or receiver (seller) of each car, but were actually paid by the auction company as were the line haul freight charges.

Almost immediately after the unloading charge became effective on November 1, 1948, the defendant auction company, through its principal officers, Mr. N. C. Ives, President, and Mr. J. Dougherty, Vice President and Treasurer, decided to institute a "terminal charge" of a certain amount per box of fruit (182a et seq.). This terminal charge was assessed against the buyer of the fruit, and while its avowed purpose was to make sure of supplies (185a), Mr. Dougherty testified that it was calculated to equal as closely as possible the amount of the unloading charge imposed by the railroads on the receiver (200a). This procedure had been followed by the New York fruit auction companies when the unloading charge was announced there. A formal notice of the terminal charge imposed by the defendant went out to all its customers on November 18, 1948, and the terminal charge became effective on November 22, 1948 (315a).

When the unloading charge was reduced by the Interstate Commerce Commission in 1952, the defendant auction company on June 22, 1952, notified all its customers that effective on the same day as the reduced unloading charge, the terminal charge was similarly being reduced (82a, 83a).

In 1956, the terminal charge was discontinued, effective October 17, the same date upon which the unloading charge was discontinued pursuant to the I. C. C. order.

Throughout the period during which the terminal charge was imposed, this charge was represented to be for the purpose of passing on to the buyers the amount of the railroad's unloading charge (315a). This purpose was manifested in the letter that announced the imposition of the terminal charge in 1948, that which stated the reduction of the charge in 1952, and the letter which announced the discontinuance of the charge in 1956, as well as by oral statements made by the officials of the auction company (18a).

Although the buyers were unhappy about the imposition of the terminal charge, no action was taken by them until 1955. This was for two reasons. First, because plaintiffs had complete confidence in the auction company (23a). And, second, in any event, they had no other choice as the buyers had no other place to obtain their merchandise (121a).

In 1955, however, certain events caused some of the buyers to believe that the amount being collected as a terminal charge was far in excess of the amount being paid to the railroad for the unloading charge, and that, in fact, the auction company was clearing a handsome profit. Mr. Freedman made a check and his suspicion was confirmed. His findings were made known to the members of the Philadelphia Fruit Buyers Association an unincorporated organization of whom all of the plaintiffs are members, and in May of 1955, a committee was appointed to take the matter up with the auction company. The committee received no satisfaction from the company and this suit was instituted in November of that year (23a et seq.).

At the time the terminal charge was originally assessed, and for some time thereafter, the reason given for the terminal charge was always in reference to the unloading charge imposed by the railroad. Since institution of the suit and at the trial below, however, Mr. Dougherty, Presi-

dent of the auction company, added that the terminal charge was levied for "services rendered" to the buyers. These services were explained to be the following (240a et seq.):

1. Assuring a supply of fruit;

2. Directing the buyers' trucks to the merchandise they had purchased at the sale;

3. Displaying the merchandise before the sale so buyers could inspect it;

4. Occasional use of the telephone.

At the time of the trial and by calculations made over a weekend during the trial, defendant added the service of billing to and collecting from the buyers the terminal charge. The accountant allocated bookkeepingwise for the period here involved a total expense of $78,785 (322a) but it is to be noted that actually the defendant neither employed extra help nor paid any additional salary when the terminal charge became effective.

Prior to 1948, all these so-called services to the buyer had been supplied by the auction company without fee. When the charge was removed in 1956, these services were again provided free. Mr. Dougherty admitted that the matter of these "services" was never mentioned to the buyers until after 1955. Plaintiff contends that these services were incidental to the defendant's principal function in acting for the seller.

The services rendered for the seller, for which the auction company received a commission from the sellers, were (246a et seq.):

1. Displaying the merchandise;

2. Selling the merchandise for the seller;

3. Making the merchandise available to the buyer after the sale;

4. Assumption of credit risks;

5. Rendering of an accounting.

Because of the statute of limitations, the suit was limited to damages accruing after November 17, 1949. During the period in question in this suit, the auction company collected from all of the buyers as terminal charges the sum of $1,848,892. Of this amount, $1,489,443 was paid to the railroad for unloading charges. This left, therefore, a balance of $359,449 which the auction company retained. Against this figure stands the sum of $78,785—the bookkeeping figure for billing and collecting the terminal charge (322a). Actually the billing and collecting presented no additional expense to the auction company as no additional help was needed nor was overtime required. It should be noted that during the period prior to July 1952, when the unloading charge was reduced, the auction company retained between 10.56 and 14.93 percent of the amount collected each year as terminal charge. After the reduction in the unloading charge in 1952, the auction company retained from 25.78 to 27.77 percent each year (299a).

Of the total amount of the terminal charge collected from the buyers, plaintiff Freedman paid $14,801, plaintiff Dankel paid $17,856 and plaintiff Rosengarten paid $55,764 (301a). Plaintiffs claim repayment of these sums, trebled, and counsel fees.

The case was tried in the District Court for the Eastern District of Pennsylvania before the Honorable Francis L. Van Dusen, and a jury, which found for the defendant. Upon plaintiff's motion for judgment, N. O. V., the court held that the plaintiffs were not damaged, and because of this, stated that it was unnecessary to determine whether the terminal charge was illegal.

The decision of the District Court was affirmed by the United States Court of Appeals for the Third Circuit, using the same reasoning.

ARGUMENT.

Reasons for Granting the Writ.

I.

The decision of the Court below, without precedent in this Court, denying recovery because, allegedly, the illegally extracted charges in violation of the Robinson-Patman Act were passed on to third parties, is erroneous and directly conflicts with decisions of the Supreme Court of the United States and the reasoning supporting them, allowing the recovery of charges illegally collected by carriers under the Interstate Commerce Act, despite the argument that they were passed on to third parties.

II.

The decisions of the Second, Third and Eighth Circuits are in conflict on the measure of damages resulting from violation of the Robinson-Patman Act.

III.

On an issue of utmost importance to trade and commerce throughout the entire country, namely, on the question whether "passing on" renders non-actionable an admittedly illegal or discriminatory charge in violation of the Robinson-Patman Act, the decision of the Court below erroneously distinguishes a prior decision of the Third Circuit, which in turn conflicted with the decisions of the Seventh and Eighth Circuits.

IV.

The decision of the Court below is erroneous, and if allowed to stand, would virtually eliminate all private enforcement of the Robinson-Patman Act, contrary to the express Congressional intent.

Authorities.

I.

The Court below found it unnecessary to determine whether or not the defendant had been guilty of illegally extracting charges in violation of the Robinson-Patman Act since the Court held, this was made unnecessary, because the defendants had "passed on" these illegal charges to third persons. That reasoning is in direct conflict with the reasoning of the Supreme Court in the following cases:

Thomsen v. Cayser, 243 U. S. 66 (1917);
Chattanooga Foundry & Pipe Works v. The City of Atlanta, 203 U. S. 390 (1906);
Southern Pacific Co. v. Darnell-Taenzer Lumber Co., 245 U. S. 531 (1918).

It is true that these cases arise under the Interstate Commerce Act. This Act, we submit, is quite similar to the Robinson-Patman Act, even to the point of distinguishing between illegal and discriminatory charges.

In each of the above cited cases, there was a suit to recover as damages an overcharge or illegal rate prohibited by the provisions of the Interstate Commerce Act. This Court held, that the plaintiffs could recover the amount of an illegal charge as damages. Upon extraction of the illegal charge the congressionally created tort is complete. Whatever happens thereafter does not absolve the tortfeasor from liability.

In *Southern Pacific Co. v. Darnell-Taenzer Lumber Co., supra*, this Court, in a reparation suit for damages, caused by rate of overcharge where the plaintiff's right to recover, was questioned, since his customer actually paid the overcharge stated through Mr. Justice Holmes at p. 533:

> "The general tendency of the law, in regard to damages at least, is not to go beyond the first step. As it does not attribute remote consequences to a defend-

ant so it holds him liable if proximately the plaintiff has suffered loss. The plaintiff suffered losses to the amount of the verdict when they paid. Their claim accrued at once in the theory of the law and it does not inquire into later events."

II.

In *Elizabeth-Arden Sales Corp. v. Gus Blass Co.*, 150 F. 2d 988 (8th Cir.), *cert. denied*, 326 U. S. 733 (1945), the Eighth Circuit awarded as damages, the amount of the discrimination, despite the argument made that plaintiffs should be required to establish some special injury to its business. The Eighth Circuit followed the Supreme Court reasoning in *Bruce's Juices, Inc. v. American Can Co.*, 330 U. S. 743 (1947), wherein it was stated at p. 955:

> "For despite petitioner's plaint on the difficulty of proving damages, it would establish its right to recover three times the discriminatory difference without proving more than the illegality of the prices. If the prices are illegally discriminatory, petitioner has been damaged, in the absence of extraordinary circumstances, at least in the amount of that discrimination."

The opposite conclusion was reached by the Second Circuit in *Sun Cosmetic Shoppe, Inc. v. Elizabeth-Arden Sales Corp.*, 178 F. 2d 150 (2d Cir. 1949). We submit that this conflict between the circuits needs to be resolved.

III.

The Third Circuit in *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 185 F. Supp. 826 (M. D. Pa.), *aff'd per curiam*, 281 F. 2d 481 (3d Cir.), *cert. denied*, 364 U. S. 901 (1960), held that a shoe manufacturer who was required to pay excessive rental and royalty charges for a shoe machine, could recover the excess charges. The late Judge

Goodrich, sitting specially, observed pertinently in footnote 3 on page 829, as follows:

> "The situation here is analogous to a plaintiff's action for damages sustained as a result of a defendant's negligence. All of the elements of such a cause of action are present here. Thus there is (1) a legal duty on defendant's part (to obey the antitrust laws), (2) a violation of that duty, (3) a causal connection between the violation of that duty and any harm that plaintiff may have suffered, and (4) actual harm to the plaintiff (the excessive rentals paid). See Prosser, Torts § 35 (2d ed. 1955). Cf. Restatement, Torts § 281 (1934). Before this Court is an easy case measured by these standards since there is no problem of causation and defendant's misconduct was intentional, not merely negligent."

Judge Goodrich thus completely discounted the possibility that "the passing on" could have any effect upon the defendant's liability. Judge Goodrich distinguished the situation from the so-called "oil jobber" cases, noting in footnote 10 on page 830 that they "have been criticized" on the ground that the plaintiffs in the "oil jobber" cases were merely "middle men". The opinion of Judge Goodrich appears to make it quite clear that the Court would have disregarded the possibility of "passing on" whether or not the plaintiff was a "middle man". Also we submit that, as in the *Hanover Shoe* case, the plaintiffs here were the "consumer" of the alleged services for which the illegal charge was made.

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1. Twin Ports Oil Co. v. Pure Oil Co., 119 F. 2d 747 (8th Cir. 1941), *cert. denied* 314 U. S. 644 (1941); Northwestern Oil Company v. Socony-Vacuum Oil Co., 138 F. 2d 967 (7th Cir., 1943), *cert. denied* 321 U. S. 792 (1944); Clark Oil Co. v. Phillips Petroleum Co., 148 F. 2d 580 (8th Cir., 1945), *cert. denied* 326 U. S. 734 (1945); Leonard v. Socony-Vacuum Oil Co., 42 F. Supp. 369 (W. D. Wisc. 1942), *appeal dismissed on other grounds*, 130 F. 2d 535 (7th Cir., 1942).

IV.

If the decision of the Court below, is permitted to stand, it would mark the virtual end of the private enforcement of the Robinson-Patman Act. The holding of the Court below that only the ultimate consumer has a cause of action diffuses and fragmentizes the right to bring an action. It is unrealistic to assume that the customer who purchases a bag of oranges would ever trouble himself to bring an action. The victims' rights are so scattered and rendered so small, that the private enforcement of the Act which Congress has deemed so desirable will be wholly eliminated.

The question presented by this Writ is particularly important today when there have been a multitude of damage suits following convictions for violation of the antitrust laws.

CONCLUSION.

For the reasons hereinabove stated, this petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit should be granted.

Respectfully submitted,

DAVID BERGER,
WALTER STEIN,
Attorneys for Petitioner.

FRANK H. GELMAN,
Of Counsel.

APPENDIX.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 13,670

SAMUEL FREEDMAN, JAMES A. COLLINSON, CHARLES DANKEL, CHARLES H. DAVIS, SAM GORBERG, SIDNEY L. HYMAN, JAMES F. PONTARI, ISRAEL ROBINSON AND MAX ROBINSON, INDIVIDUALLY AND TRADING AS ROBINSON BROS., E. J. ROSENGARTEN, TIM WOLF, JACK ZEITZ, INDIVIDUALLY AND ON BEHALF OF ALL OTHER SIMILARLY SITUATED MEMBERS OF THE PHILADELPHIA FRUIT AUCTION BUYERS' ASSOCIATION

v.

PHILADELPHIA TERMINALS AUCTION CO., A NEW JERSEY CORPORATION

SAMUEL FREEDMAN, CHARLES J. DANKEL AND EMANUEL J. ROSENGARTEN,
Appellants

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Argued December 19, 1961

Before McLAUGHLIN, KALODNER and HASTIE, *Circuit Judges*

OPINION OF THE COURT

(Filed April 9, 1962)

By KALODNER, *Circuit Judge*

This suit originated as a spurious class action brought by twelve members of the Philadelphia Fruit Auction

Buyers' Association, an unincorporated association, seeking individually and on behalf of other members of the association to recover treble damages [1] from defendant, Philadelphia Terminals Auction Company, for an alleged violation of Section 2(c) of the Clayton Act, as amended by the Robinson-Patman Act.[2] The trial was limited to the claims of plaintiffs Samuel Freedman, Charles Dankel and Emanuel J. Rosengarten.

Freedman and Dankel are brokers who purchase fruit at defendant's auctions on behalf of regular clients. They pay the purchase price to defendant and bill their clients for the amount paid plus their commission of five or ten cents per box of fruit. Rosengarten is primarily a wholesaler. He purchases at defendant's auctions for his own account, reselling the fruit to customers at his store.

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1. Suit was brought under Section 4 of the Clayton Act, 15 U. S. C. §15, which provides:

"Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

2. Section 2(c) provides:

"It shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid." 49 Stat. 1527, 15 U. S. C. § 13(c).

The complaint also alleged violations of Sections 1 and 2 of the Sherman Act, 15 U. S. C. §§ 1, 2, and included two common law counts. During trial, each of these charges was either dismissed or withdrawn.

By its special verdict,[3] the jury found that defendant had not violated Section 2(c) and that plaintiffs had not been injured in their business or property by reason of the alleged violation. Plaintiffs appeal from the Order of the District Court denying their Alternative Motion for Judgment Notwithstanding the Verdict or New Trial.[4] The material facts, as disclosed by the record may be summarized as follows:

Defendant operates the only auction market in the Philadelphia area through which fresh fruit arriving via railroad from various states, primarily Florida, California, Washington and Oregon, is sold at wholesale in less than carload lots. The fruit arrives in Philadelphia, consigned

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3. The special verdict was as follows:

"1. Were the terminal charges received or accepted by defendant from the plaintiffs 'as a commission, brokerage or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, . . . to an agent, representative or intermediary' in such transaction who 'was acting in fact for or in behalf or (was) subject to the direct or indirect control of' the receivers?

(yes or no) *No*

"2. Were the following plaintiffs injured in their business or property by reason of the receipt or acceptance by defendant of the terminal charges?

Charles Dankel	(yes or no)	*No*
Samuel Freedman	(yes or no)	*No*
E. J. Rosengarten	(yes or no)	*No*

"3. What was the amount of the injury to the following plaintiffs?

Charles Dankel	$ *None*
Samuel Freedman	$ *None*
E. J. Rosengarten	$ *None*"

4. The District Court certified its Order for appeal under 28 U. S. C. §1292(b) and also directed the entry of final judgment under Rule 54(b), Fed. R. Civ. P., 28 U. S. C. We granted plaintiffs' application for permission to appeal under 28 U. S. C. § 1292(b).

The Opinion of the District Court is reported at 197 F. Supp. 849 (E. D. Pa. 1961); see also 145 F. Supp. 820 (1956) (opinion denying defendant's Motion to Dismiss Complaint); 198 F. Supp. 429 (1961) (memorandum on defendant's Motion to Review Clerk's Taxation of Costs).

by the growers and shippers to their Philadelphia representatives, who are known in the trade as "receivers". Through auction sales conducted by defendant, the receivers sell the fruit for distribution in the Philadelphia market area, which includes parts of Pennsylvania, New Jersey and Delaware. Defendant remits to the receivers or their principals the amount of the sales less defendant's commission. Defendant also deducts the freight charges, which it remits to the railroads on behalf of the receivers. Although the freight bills are made out by the railroads in the names of the receivers, the railroads have traditionally presented these bills to defendant for payment.

From November 1948 until October 1956 the railroads, pursuant to permission granted by the Interstate Commerce Commission, imposed, in addition to freight charges, a charge for unloading the fruit from the railroad cars. These unloading charges were based on tonnage and, like the freight charges, were billed by the railroads in the names of the receivers but were paid by defendant. Defendant did not, however, deduct the amount of the unloading charges from its remittances to the receivers. Instead, it collected from the auction buyers a "terminal charge" of a specified amount per box of fruit. Defendant's president testified that the decision to institute the terminal charges was made without consulting the receivers or their principals. A schedule of terminal charges applicable to the various types of fruit was announced by defendant prior to the institution of the charges in November, 1948, and a schedule of reduced charges was announced when the Interstate Commerce Commission required the railroads to reduce the unloading charges in 1952. The terminal charges were discontinued in 1956 when the Commission ordered the discontinuance of the unloading charges. The terminal charges collected by defendant exceeded the amounts paid by defendant to the railroads as unloading charges. The difference, which was retained by defendant, ranged from a low during the first six months of 1952 of 10.56 percent of

terminal charges collected from all buyers, to a high in 1955 of 27.77 percent.

Plaintiffs brought this suit on November 17, 1955, contending that the collection of the terminal charges was violative of Section 2(c). The trial judge ruled that because of the statute of limitations, plaintiffs' claims must be limited to the six-year period preceding the filing of the complaint. During this period Freedman paid terminal charges of $14,810; Dankel, $17,853; and Rosengarten, $55,867.

As stated earlier, the jury found that defendant had not violated Section 2(c) and that plaintiffs had not been injured in their business or property by reason of the alleged violation. On the score of injury to plaintiffs, there was evidence from which the jury could reasonably conclude that plaintiffs passed on to their clients and customers the amount of the terminal charges and that the charges did not result in a reduction in the volume of plaintiffs' business. It was undisputed that Freedman and Dankel, when they billed their clients for the purchase price of the fruit, included in these statements the amount of the terminal charges. In fact, after 1952, when terminal charges on certain types of fruit were 3½ cents and 4½ cents per box, Freedman and Dankel, with the consent of their clients, billed these charges at 4 cents and 5 cents respectively, thus making a profit on them. Rosengarten, who bought on his own account for resale,[5] testified that it had been his practice during all the years he had been in business to try to resell at a mark-up of twenty-five to thirty-five cents per box above the total of the cost of the fruit and the expense of hauling it to his store and that during the period when terminal charges were in effect he included them in computing the resale price that would have to be obtained in order to realize the desired mark-up. On this score his business records show that his profit margins were higher

5. Although Rosengarten was primarily a wholesaler, about five per cent of his purchases were made by him as a broker. With respect to these purchases, he billed his clients for the terminal charges together with the purchase price.

during the period when terminal charges were in effect than they were prior to that time.

On this appeal, plaintiffs contend (1) the collection of the terminal charges, or at least that part which was retained by defendant, violated Section 2(c); and (2) plaintiffs are entitled to recover the amounts thus illegally collected by defendant.

In disposing of this appeal it is unnecessary for us to rule on the first of plaintiffs' contentions, viz., that the collection of the terminal charges violated Section 2(c), in view of the jury's finding that plaintiffs suffered no injury by reason of their payment of the charges. As earlier stated there was ample evidence to sustain the jury's finding in this respect and by the terms of Section 4 of the Clayton Act,[6] injury to "business or property" is an essential ingredient of right to recovery of damages for conduct forbidden by the antitrust laws.

Plaintiffs contend that despite the jury's finding of no injury, they are nevertheless entitled to recover the terminal charges that they paid. They rely on the case of Hanover Shoe, Inc. v. United Shoe Machinery Corp., 185 F. Supp. 826 (M. D. Pa. 1960), aff'd per curiam, 281 F. 2d 481 (3 Cir. 1960), cert. denied, 364 U. S. 901 (1960), in which a shoe manufacturer sued a lessor of shoe manufacturing machinery to recover damages allegedly resulting from a claimed violation of Section 2 of the Sherman Act, 15 U. S. C. § 2. It was there claimed that as a result of defendant's unlawful control of the market, the plaintiff had paid excessive rentals under a shoe machinery lease. The defendant contended that the plaintiff had not been injured inasmuch as it had passed along to its customers, via its pricing, the excessive rental charges.

Hanover affords no nourishment to plaintiffs' contention with respect to it. There the District Court in granting relief to the plaintiff premised its action on its fact-finding that plaintiff was a *consumer* and not a *middleman* and implicit in that distinction is its subscription to the

6. See Note 1, *supra*.

doctrine enunciated in earlier cases[7] that middlemen cannot recover damages where they suffer no injury by reason of their payment of proscribed charges.

In *Hanover* the District Court found valid the plaintiff's contention that it was "simply a lessee of equipment which sells its own product" and was not a middleman "selling a product supplied for resale." In doing so the District Court said:

> "[T]his Court feels that the . . . distinction made by plaintiff is sufficient. Furthermore, this Court . . . agrees with Professor Clark . . . that where the plaintiff is a consumer of the product, rather than a middleman who resells it, he may recover the excess paid whether or not he has ultimately passed the excess along to his customers. *Plaintiff herein was such a consumer.*" (emphasis supplied) 185 F. Supp. at 831.

In the instant case the testimony clearly established that Freedman and Dankel acted as brokers and Rosengarten was a wholesaler who simply resold the product which he purchased at the auctions. All three, as previously stated, passed along to their outlets the terminal charges complained of.[8] Not by any stretch of the imagination can they be classified as consumers.

For the reasons stated the judgment in favor of defendant and against the plaintiffs Samuel Freedman, Charles Dankel and E. J. Rosengarten, with costs, filed May 3, 1961, and the Order of the District Court of that date denying said plaintiffs' motions for judgment n.o.v. and/or a new trial will be affirmed.

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7. Miller Motors, Inc. v. Ford Motor Co., 252 F. 2d 441 (4 Cir. 1958); Northwestern Oil Co. v. Socony-Vacuum Oil Co., 138 F. 2d 967 (7 Cir. 1943), cert. denied, 321 U. S. 792 (1944); Leonard v. Socony-Vacuum Oil Co., 42 F. Supp. 369 (W. D. Wis. 1942), appeal dismissed, 130 F. 2d 535 (7 Cir. 1942); Twin Ports Oil Co. v. Pure Oil Co., 119 F. 2d 747 (8 Cir. 1941), cert. denied, 314 U. S. 644 (1941); Clark Oil Co. v. Phillips Petroleum Co., 148 F. 2d 580 (8 Cir. 1945), cert. denied, 326 U. S. 734 (1945).

8. Kidd v. Esso Standard Oil Company, 295 F. 2d 497 (6 Cir. 1961).

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IN THE

Supreme Court of the United States

October Term, 1962.

No. 228.

SAMUEL FREEDMAN, et al.,
Petitioners,

v.

PHILADELPHIA TERMINALS AUCTION COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

Brief for Respondent in Opposition.

C. Brewster Rhoads,
Sidney L. Wickenhaver,
Thomas N. O'Neill, Jr.,
1421 Chestnut Street,
Philadelphia 2, Pa.,
Attorneys for Respondent.

International, 711 So. 9th St., Phila. 47, Pa.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1962.

No. 228.

SAMUEL FREEDMAN, ET AL.,
Petitioners,

v.

PHILADELPHIA TERMINALS AUCTION COMPANY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION.

QUESTIONS PRESENTED.

1. Was the jury warranted in finding that petitioners (auction buyers) were not injured in their business or property by paying terminal charges to respondent fruit auction company as a uniform term of all sales?

2. Are such charges unlawful payments of commission, brokerage or other compensation under the brokerage clause of the Robinson-Patman Act, 15 U. S. C. § 13(c)?

3. If such charges otherwise constitute such brokerage, are they not lawful under the Act as charges for services rendered?

4. Were such payments received by the auction company in the course of interstate commerce under the Robinson-Patman Act when they were received as a term of sale at a local auction of fruit for intrastate delivery and the interstate transportation of the fruit had ceased prior to the auction sale?

STATEMENT OF THE CASE.

This is a spurious class suit brought by members of the Philadelphia Fruit Auction Buyers Association seeking treble damages for an alleged violation of Section 2(c) of the Clayton Act as amended by the Robinson-Patman Act. The claims of petitioners Freedman, Dankel and Rosengarten were severed from the claims of others for trial. The jury returned a special verdict in favor of respondent. Thereafter the United States District Court for the Eastern District of Pennsylvania (Hon. Francis L. Van Dusen, J.) denied petitioners' motion for judgment n.o.v. or new trial, and the United States Court of Appeals for the Third Circuit affirmed.

Respondent conducts public auction sales of fresh fruit shipped into Philadelphia. Its salesrooms are located at railroad terminals where carloads of fruit are delivered and unloaded for sale. Petitioners are buyers who attend the auction sales on every business day and purchase fruit.

From November 22, 1948 to October 17, 1956, respondent collected from petitioners and all other auction buyers a terminal charge of a specified amount per package for each kind of fruit purchased at auction. These terminal charges were uniform as to all buyers and were part of the pre-announced terms of sale. The terminal charges were instituted by respondent after the railroads had been granted permission by the Interstate Commerce Commission to impose an unloading charge effective on November 1, 1948, for the railroads' service of unloading the fruit at the terminal. This unloading charge was a separate charge, additional to the railroads' line-haul freight. The railroad unloading charges were imposed against the entire carload based on tonnage. They were reduced by the Interstate Commerce Commission, effective on July 3, 1952, and at that time the respondent reduced its per package terminal charges to auction buyers. The unloading charges were cancelled on Octo-

ber 17, 1956 by order of the Commission, and respondent's terminal charges were discontinued on that date.[1]

The decision of respondent's officers to institute terminal charges was occasioned by the fact that the New York Fruit Auction Company had imposed similar charges the previous week, after railroad unloading charges had become effective as to fruit sold at auction in New York (186a). Historically, the freight charges to New York and to Philadelphia for a carload of fruit were identical, regardless of whether the fruit was shipped from California or Florida (185a). Respondent's officers believed that, if shippers to the Philadelphia market were required to pay an additional railroad unloading charge which they were not required to pay on shipments to New York, fruit would be diverted to New York and there would be a substantial decrease in volume of fruit coming into Philadelphia to be sold at auction. Such a diversion of supplies would have injured not only defendant's business but also the business of the auction buyers, who depended on the Philadelphia market (185a-187a).

Terminal charges were computed at a per package rate in an amount sufficient to cover the tonnage unloading charges paid to the railroads and also to cover the additional clerical, bookkeeping and collection costs incurred by respondent. Respondent also endeavored to have as few different rates of terminal charges as were practicable and to have most of the charges at a round number of cents per package. The rates of the terminal charges were announced to petitioners and all buyers, and all buyers knew

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1. The history of this litigation is set forth in *Unloading Charges on Fruits and Vegetables at New York and Philadelphia*, 272 I. C. C. 648 (1948), 286 I. C. C. 119 (1952), 298 I. C. C. 637 (1956); and *Florida Citrus Commission v. United States*, 114 F. Supp. 420 (S. D. Fla. 1953), reversed sub nom. *Secretary of Agriculture v. United States*, 347 U. S. 645 (1954). Respondent participated in this litigation as one of the protestants.

the rates of the unloading charges which respondent paid to the railroads.[2]

Petitioners paid the terminal charges on respondent's invoices to them, as did all the other auction buyers on the same uniform terms. Each of these petitioners testified that the existence of the terminal charges, the amount of which was known prior to all the sales, was taken into consideration in the bidding (83a, 95a-96a, 133a-134a).

Petitioners Freedman and Dankel conducted their business as buying brokers only. They did not make purchases for their own account for resale, but bought only on behalf of principals, who reimbursed them for the entire price paid by them to respondent for the merchandise including all terminal charges, and who paid them a commission for their services, usually 10¢ per box. In their own billings to the principals, Freedman and Dankel included the amount of the terminal charges in the total price paid for the goods, without separate itemization. After 1952, when terminal charges on certain packages were 3½¢ and 4½¢ per package, these two petitioners (with the consent of their principals) "rounded out" the charges to 4¢ and 5¢ respectively, thus collecting from their principals a greater terminal charge than they had paid to respondent and retaining the difference as profit (50a-52a, 93a-94a).

Some of the principals for whom Freedman and Dankel purchased at auction had their own credit with respondent, and their charges were paid directly by the principals to respondent. The Court charged that terminal charges paid directly by the principals could be considered in support of petitioners' claim that their business or property had been injured by the terminal charges.

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2. The difference between terminal charges collected and railroad unloading charges paid by respondent was complained of by petitioner only in Count II of the Complaint, which charged that respondent had fraudulently represented to the buyers that the amount of terminal charges billed to them was equivalent to the amount of unloading charges paid to the railroad. Count II was dismissed by the trial judge and no appeal was taken from this dismissal.

Petitioner Rosengarten was primarily a wholesaler.[3] In setting his price on resale, his usual mark-up was about 25¢ or 35¢ per package above his costs, including terminal charges and hauling (127a-132a). Such mark-up had not changed much for the thirty-five years that he had been in business, which included periods when terminal charges were in effect and periods when there were no terminal charges (130a-131a). The records of Rosengarten's business showed that his gross sales and gross profits increased during the years while terminal charges were in effect, particularly after 1951. His profit percentage on sales also increased during those years (Ex. D-60, 325a).

Petitioners did not show any decrease in their income from their business during the time that terminal charges were in effect, and did not show any loss of income attributable to terminal charges (see, *e.g.*, 34a-36a). They contended, however, that their income would have risen during 1948 to 1956, because other people's incomes increased in that period (37a). For the period 1948 to 1956, respondent showed that trucks took a large part of the fresh fruit transportation business from the railroads (Ex. D-17A, 317a), that Philadelphia rail unloads of most kinds of fruit decreased (Ex. D-46A, 318a), that per capita consumption of fresh fruits in the United States declined (Ex. D-48, 319a) while per capita consumption of frozen fruits and juices increased (Ex. D-49, 320a), that chain stores were obtaining an increased share of the retail market at the expense of independent dealers such as those with whom petitioners dealt (Ex. D-58, 324a), and that the sales of fruit through respondent auction company decreased both in number of carlots handled (191a) and in dollar volume of sales (192a).

While the auction market conducted by respondent is the only place in Philadelphia where fresh fruit arriving by rail is sold at auction in less than carload lots, it is in com-

3. He made 95% of his purchases at auction for his own account for resale and 5% as broker for other principals (119a). As to the latter, he also was reimbursed fully by his principals (135a-136a).

petition with the wholesale market where wholesale dealers receive carloads and truckloads and resell in smaller lots (40a). Only a small amount of the fruit arriving in Philadelphia by truck was sold through respondent (250a). The bulk of the large purchases made by chain stores were received by direct carload or truckload shipments to them and not through respondent (46a-48a).

Respondent provides facilities and performs a variety of services incidental to its operation of a market place where fresh fruit is sold at auction. Its auctioneers and clerks sell fruit of competing sellers on the same terms, and all buyers are subject to the same terms (175a). Auctions are conducted according to uniform rules well known by the buyers and by the sellers or their representatives in attendance (69a-71a).

In addition to providing the services of auctioneers and clerks and the use of an auction salesroom, respondent arranges with railroads for placing cars at platform locations and for the unloading, which was performed by railroad employees. Respondent opens sample boxes for inspection by buyers before sale, and prints a daily catalogue given to buyers. Respondent's checkers see that merchandise is delivered on the platform to the rightful buyer after sale. Respondent pays the rail charges, renders an account of sales to sellers and remits to sellers the net sums due them after deduction of rail charges and respondent's commissions. Respondent extends credit to buyers, assumes the credit risk, sends itemized invoices and collects from buyers.

Petitioners alleged that the terminal charges were in violation of Sections 1 and 2 of the Sherman Act and of Section 2(c) of the Clayton Act, and that they were imposed by fraudulent misrepresentations and coercion. The trial judge dismissed the fraud count. Petitioners withdrew the claim under the Sherman Act and the claim for restitution for coercion (251a), leaving only their claim under Section 2(c) of the Clayton Act.

Petitioners did not rely at trial solely on the contention that they were entitled to automatic recovery of the amount

of terminal charges paid. At petitioners' instance, the trial judge left to the jury the questions whether the terminal charges resulted in any reduction of their volume of business or prevented them from raising their commission rates or injured their businesses in any other way. Petitioners have conceded in the District Court that the jury's verdict conclusively determined all of these questions against them and did not raise these questions on appeal.

The Court submitted to the jury for their special verdict the questions of whether the terminal charges were payments within the terms of the Act and whether each of the petitioners sustained any injury by reason of the terminal charges and the amount thereof. The jury answered all the questions in the negative (326a).

ARGUMENT.

A. The Decision Below Was Clearly Correct.

Under Section 4 of the Clayton Act, 15 U. S. C. § 15, petitioners must prove injury to business or property in order to recover damages for violation of the antitrust laws. The record amply supports the jury's finding that petitioners were not injured. Their income was not diminished by the terminal charges. Petitioners Freedman and Dankel, who are brokers, were reimbursed in full by their principals for the total charges paid by them to respondent. In fact, after 1952, when terminal charges on certain types of fruit were 3½¢ and 4½¢ per box, Freedman and Dankel billed these charges to their principals at 4¢ and 5¢ respectively, thus making a profit on them. Petitioner Rosengarten made most of his purchases on his own account as a wholesale dealer.[4] The dollar amount of his mark-up was the same when the terminal charges were in effect as when they were not. In addition, Rosengarten's records showed that his profit margin increased during the period when terminal charges were in effect, not only in gross amount but also in ratio to his total sales. The Petition for Certiorari does not deny that petitioners were fully reimbursed.[5]

Nevertheless, petitioners assert that injury to their business or property was automatically shown by payment of terminal charges, and that therefore they were entitled to recover threefold the amount paid to respondent or at least threefold the amount by which their payments ex-

4. Where he acted as a broker, Rosengarten (like Freedman and Dankel) was fully reimbursed by his principals.

5. The entire argument assumes that petitioners paid more by reason of the terminal charges invoiced to buyers than they would have paid without it. In fact, however, their total payments were not increased because their bids were decreased by the amount of the terminal charges they knew to be payable (See *infra*, p. 12).

ceeded respondent's payments of unloading charges to the railroads. Their principal reliance has been on a decision in the same Circuit, *Hanover Shoe, Inc. v. United Shoe Machinery Corporation*, 185 F. Supp. 826 (M. D. Pa. 1960), affirmed per curiam 281 F. 2d 481 (3d Cir. 1960), cert. denied 364 U. S. 901 (1960). Both the District Court and the Court of Appeals held that the *Hanover Shoe* case is not applicable to the present case.

With respect to respondent's argument that petitioners were not damaged because they were reimbursed, the trial court instructed the jury "You have got to consider that argument, of course, along with all the other evidence" (290a). This charge, the *Hanover Shoe* case and the decision of the court below conform to a series of cases (the so-called "oil jobber cases") which hold that when a complaining middleman has been reimbursed, he has had no injury to his trade or business within the meaning of Section 4 of the Clayton Act:

Twin Ports Oil Co. v. Pure Oil Co., 119 F. 2d 747 (8th Cir. 1941), cert. denied 314 U. S. 644 (1941);

Northwestern Oil Co. v. Socony-Vacuum Oil Co., Inc., 138 F. 2d 967 (7th Cir. 1943), cert. denied 321 U. S. 792 (1944);

Clark Oil Co. v. Phillips Petroleum Co., 148 F. 2d 580 (8th Cir. 1945), cert. denied 326 U. S. 734 (1945);

Kidd v. Esso Standard Oil Company, 295 F. 2d 497 (6th Cir. 1961);

Leonard v. Socony-Vacuum Oil Co., Inc., 42 F. Supp. 369 (W. D. Wis. 1942), appeal dismissed on other grounds 130 F. 2d 535 (7th Cir. 1942).

The decision below is further supported by the history of the bill which became the Robinson-Patman Act. As the

District Court observed, when this bill came to the House (S. 3154, 74th Cong., 2d Sess.) it contained the following provision:

> "the measure of damages for any violation of this section shall, where the fact of damage is shown, and in the absence of proof of greater damage, be presumed to be the pecuniary amount or equivalent of the prohibited discrimination, payment, or grant involved in such violation."

This provision was eliminated from the bill in conference.

The effect of the deletion of this provision from the bill was described by Judge Learned Hand in *Enterprise Industries, Inc. v. The Texas Company*, 240 F. 2d 457, 460 (2d Cir. 1957), cert. denied 353 U. S. 965 (1957), in which a gasoline service station operator sought treble damages for discriminatory prices paid to defendant. The Court assumed that plaintiff had proved a violation of the Act but stated "we do not think that it proved the amount of its damages, or indeed that it suffered any damages at all", 240 F. 2d at 458. Judge Hand said:

> ". . . [I]n the case at bar we have as little means of knowing whether or how far the plaintiff passed on to car owners any difference in the price charged it, as we have of knowing how far the addition affected the gallonage that it sold. . . ." 240 F. 2d at 459.

> "At all events the statute, should not be read as creating any presumption that 'where the fact of damage is shown * * * the pecuniary amount or equivalent of the prohibited discrimination' is the proper 'measure of damages.' Exactly that was a provision in the bill, when it came from the Senate to the House (S. 3154, 74th Cong., 2d Sess.), and it was eliminated in conference. This action becomes particularly persuasive in contrast with the retention of that part of § 13(b) that

> imposes a burden of proof on the seller as to the effect of a 'discrimination.' Congress obviously did not wish the seller to be under a double burden, as soon as the buyer proved that he had been charged a higher price than any of his competitors; especially the burden of proving the negative upon an issue as to which the seller could know nothing and the buyer everything. Indeed, that was a burden that Congress might well hesitate to impose in an action in which the seller must not only make good the buyer's loss, but also pay him a fine in double the amount of his loss. It is fair to suppose that, if Congress had thought the evil of price discrimination so great as to require so drastic a procedural support, it would have made its purpose more clear." [Footnote omitted.] 240 F. 2d at 460.

As the language of the proposed provision indicates, it was applicable to "any violation of this section" and not merely to a violation of Section 2(a), the subsection involved in the *Enterprise Industries* case.

Moreover, there was evidence which would have warranted the jury in finding that petitioners did not pay any more money as the result of the terminal charges than they would have paid in the absence thereof. Indeed, the nature of an auction sale virtually compels such a finding. A buyer at an auction sale cannot be required to pay and absorb a charge which is imposed uniformly on all buyers as part of the pre-announced terms of sale. The reason is that the buyers make the price, not the sellers or the auctioneer, and they make the price by their competitive bidding which takes the charge into account. Insofar as the buyers were concerned, the known terminal charge merely changed the language of the auction bidding. If there was a 10¢ terminal charge, a bid of $4.00 meant an offer to pay $4.10. In the absence of the charge, the bidder would say "$4.10". Petitioners themselves testified that they took the terminal charge into consideration when bidding (83a, 95a-96a, 133a-134a).

Petitioners were admittedly reimbursed for all that they paid. But there was actually no finding or basis for finding that the terminal charges caused any increase in their total payments. The incidence of the charges was in fact borne by the sellers who received that much less of the total amount the buyers paid.

B. The Writ Should Be Denied Because the Terminal Charges Were Lawful.

1. The terminal charges were not unlawful brokerage under Section 2(c) of the Clayton Act because they were uniform terms of sale to all auction buyers and could not result in any discrimination, direct or indirect. This Court has stated that a uniform reduction of brokerage on all sales made through a broker would not violate the Act, *Federal Trade Commission v. Henry Broch & Co.*, 363 U. S. 166, 176 (1960):

> ". . . A price reduction based upon alleged savings in brokerage expenses is an 'allowance in lieu of brokerage' when given only to favored customers. Had respondent, for example, agreed to accept a 3% commission on all sales to all buyers there plainly would be no room for finding that the price reductions were violations of § 2(c). Neither the legislative history nor the purposes of the Act would require such an absurd result, and neither the Commission nor the courts have ever suggested it. . . ."

If the terminal charges were brokerage (which is denied), it is equally true that a uniform imposition of brokerage on all sales made through respondent does not violate the Act.

2. The terminal charges were not received as "a commission, brokerage or other compensation" within the meaning of the Act. Respondent is not a broker, and it does not render brokerage services. The terminal charges were paid to cover the cost to respondent of an unloading service performed by the railroads and, accordingly, were charges for handling the goods. The brokerage clause deals

exclusively with compensation for personal "selling services"[6] and the Act has never been construed to forbid buyers to pay for services relating to the physical handling of the goods. Sellers necessarily include in their prices the amounts previously incurred for services relating to the goods, including transportation, storage, loading and unloading. Such charges may be reflected in the total sales price or may be separately stated, and are clearly lawful when they are not discriminatory. If it is assumed that respondent acted as the agent for the sellers in paying the unloading charge and collecting the terminal charge from petitioners, the terminal charge does not become unlawful under the brokerage clause because it was received by the agent, unless it would be equally unlawful for the seller himself to receive it.

3. The terminal charges were not received by respondent as an agent, representative or intermediary acting for or under the control of the sellers. As an auctioneer, respondent dealt with all sellers as an independent contractor and on the same terms for the same services. The legislative history of the Act reveals that the brokerage clause was not intended to prohibit brokerage payments to genuinely independent intermediaries. The brokers in the present situation are petitioners, who purchase for their principals, and the receivers, who, on behalf of the growers, order respondent to sell the fruit. There is no warrant for applying *the brokerage clause to an auctioneer* or to the general services and facilities rendered by an auction exchange. It is a well-known method of selling merchandise, and there is no suggestion in the legislative history of the Act that Congress was concerned with practices involved

6. "In the consideration of the brokerage clause it will simplify the problem of its construction and meaning, if at all times it is borne in mind that this sub-section deals exclusively with personal 'selling' services and compensation therefor. Other types of services and facilities furnished are dealt with in sub-sections 2(d) and 2(e) of the Act." *The Robinson-Patman Act*, by Wright Patman, The Ronald Press Company, 1938, at p. 99.

in auction sales, or that Congress found any abuses, actual or potential, in the conduct of auction sales or the practice of an auction exchange in making charges to sellers and buyers.

4. The terminal auction and financial services rendered by respondent (described in the statement of facts) justified the terminal charges under Section 2(c), if the provision were otherwise applicable, because they were made "for services rendered in connection with the sale or purchase of goods, wares, or merchandise."

5. The payment of terminal charges to respondent was not made in the course of interstate commerce as required by the Robinson-Patman Act.[7] The sales which take place at the auction operated by respondent are purely local in character, and the services of respondent are rendered locally. Interstate transportation of the merchandise has come to an end and it is sold at auction for local delivery in Philadelphia to the buyer without the use of any instrumentality of interstate commerce. Accordingly, the transactions complained of are not in the course of such commerce. *Hopkins v. United States*, 171 U. S. 578 (1898); *Moore v. New York Cotton Exchange*, 270 U. S. 593 (1926).

C. The Reasons Relied Upon by Petitioners for Allowance of the Writ Do Not Justify Its Issuance.

1. Petitioners claim that the decision below conflicts with the following decisions of this Court:

> *Thomsen v. Cayser*, 243 U. S. 66 (1917);
> *Chattanooga Foundry and Pipe Works v. City of Atlanta*, 203 U. S. 390 (1906);
> *Southern Pacific Co. v. Darnell-Taenzer Lumber Co.*, 245 U. S. 531 (1918).

No such conflict exists.

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7. *Lewis v. Shell Oil Co.*, 50 F. Supp. 547, 549 (N. D. Ill. 1943); *Sears, Roebuck & Company v. Blade*, 110 F. Supp. 96, 101 (S. D. Cal. 1953).

The *Southern Pacific* case involved freight rate overcharges in violation of the Interstate Commerce Act. This Court held that there can be a recovery of such an overcharge without proof of pecuniary loss and that the only one who can recover is the one in privity with the carrier. This Court has held that such cases are not applicable to an action for damages under the antitrust laws. *Keogh v. Chicago & Northwestern Railway Company*, 260 U. S. 156, 164-165 (1922).

In *Thomsen v. Cayser* and *Chattanooga Foundry and Pipe Works v. City of Atlanta*, the plaintiffs incurred pecuniary losses and juries had so found. It did not appear that they had been reimbursed for their losses. Judgments in accordance with the verdicts were upheld. In the present case the jury has found that petitioners did not incur any injury.

In three of the oil jobbers cases relied upon by the court below, petitions for certiorari were filed. In all of those cases petitioners made the same argument based upon the freight overcharge decisions of this Court that petitioners make in the present case. Nonetheless, certiorari was denied.[8]

2. Petitioners assert a conflict between *Elizabeth Arden Sales Corporation v. Gus Blass Co.*, 150 F. 2d 988 (8th Cir. 1945), cert. denied 326 U. S. 773 (1945), and *Sun Cosmetic Shoppe, Inc. v. Elizabeth Arden Sales Corporation*, 178 F. 2d 150 (2d Cir. 1949). As Judge Learned Hand has noted,[9] the holding in the *Gus Blass* case, which is relied

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8. *Northwestern Oil Co. v. Socony-Vacuum Oil Co., Inc.*, 138 F. 2d 967 (7th Cir. 1943), cert. denied 321 U. S. 792 (1944) (Petition for Certiorari, pp. 14-16); *Twin Ports Oil Co. v. Pure Oil Co.*, 119 F. 2d 747 (8th Cir. 1941), cert. denied 314 U. S. 644 (1941) (Petition for Certiorari, p. 3); *Clark Oil Co. v. Phillips Petroleum Co.*, 148 F. 2d 580 (8th Cir. 1945), cert. denied 326 U. S. 734 (1945) (Petition for Certiorari, p. 20).

9. *Enterprise Industries, Inc. v. The Texas Company*, 240 F. 2d 457, 459 (2d Cir. 1957), cert. denied 353 U. S. 965 (1957).

upon by petitioners to establish a conflict was overruled in *American Can Co. v. Russellville Canning Co.*, 191 F. 2d 38 (8th Cir. 1951). In any event, petitioner does not assert a conflict between the *Gus Blass* decision and the decision of the court below.

3. Petitioners assert that the decision of the court below erroneously distinguishes one of its own prior decisions, *Hanover Shoe, Inc. v. United Shoe Machinery Corporation*, 185 F. Supp. 826 (M. D. Pa. 1960), affirmed per curiam 281 F. 2d 481 (3d Cir. 1960), cert. denied 364 U. S. 901 (1960); and that the *Hanover Shoe* decision conflicted with the decisions of the Seventh and Eighth Circuits in the oil jobber cases. What the decision below actually does is to harmonize its previous decision in the *Hanover Shoe* case with the oil jobber cases. A conflict between the *Hanover Shoe* decision and the oil jobber cases was asserted in United Shoe Machinery's petition for certiorari in the *Hanover Shoe* case (pp. 7-14), but certiorari was denied.

4. Petitioners assert that the decision of the court below will mean the virtual end of private enforcement of the Robinson-Patman Act. This contention is devoid of merit. What petitioners are arguing for is an arbitrary rule of damages which would eliminate the requirement of the statute that the fact of injury to business or property be proved. Petitioners are advocating a rule which would permit recovery even where no injury had been sustained. If petitioners' view were correct, mere proof of the payment of brokerage without more would automatically resolve in liability for three times the amount of the brokerage without regard to whether any damage has in fact been inflicted and even where it is clearly shown that no damage has occurred. There is no warrant for such a result.

CONCLUSION.

For the reasons stated herein, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

C. Brewster Rhoads,
Sidney L. Wickenhaver,
Thomas N. O'Neill, Jr.,
Attorneys for Respondent.